2004

State of Utah v. Mazhar Tabesh : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	**Case No. 20040358-CA**
v.	:	
MAZHAR TABESH,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR AGGRAVATED ARSON, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-103 (1999), IN THE FOURTH JUDICIAL DISTRICT, WASATCH COUNTY, THE HONORABLE DONALD J. EYRE PRESIDING

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant appeals from a conviction on one count of aggravated arson, a first degree felony. This Court has jurisdiction pursuant to the "pour-over" provisions of Utah Code Ann. § 78-2a-3(2)(j) (Supp. 2002).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

I. Has defendant demonstrated insufficient evidence to support the verdict where he has not fully marshaled the evidence?

To prevail on a sufficiency challenge to a jury verdict, a defendant "must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict." *State v. Pritchett*, 2003 UT 24, ¶ 22, 69 P.3d 1278 (citations and internal quotation marks omitted). A verdict will only be reversed "when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt

that the defendant committed the crime of which he [or she] was convicted." *State v. Brown*, 948 P.2d 337, 343 (Utah 1997) (citations and internal quotation marks omitted) (alteration in original).

II. Should this Court reach defendant's prosecutorial misconduct claim where defendant's only comment at the time was, "I will reserve an objection on that," defendant never pursued the matter further on the record, and, by his own admission, he received all the relief he requested at trial?

No standard of review applies to this issue.

III. Did the trial court commit reversible error in admitting scientific evidence where the same inference would have existed even had the challenged evidence not been admitted?

"Although the admission or exclusion of evidence is a question of law, [this Court] review[s] a trial court's decision to admit or exclude specific evidence for an abuse of discretion." *State v. Cruz-Meza*, 2003 UT 32, ¶ 8, 76 P.3d 1165.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutory provision is attached at Addendum A:

Utah Code Ann. § 76-6-103 (1999)

STATEMENT OF THE CASE

On September 19, 2002, defendant was charged with aggravated arson, a first degree felony (R. 4-5, 7-8). After a preliminary hearing, defendant moved to dismiss for lack of evidence (R. 55-68). The magistrate denied defendant's motion and bound him over as charged (R. 69-75).

Defendant's four-day trial began on February 9, 2004 (R. 393). At the close of the State's evidence, defendant moved to dismiss for lack of a prima facie case (R. 396:63). The trial court denied defendant's motion (R. 396:63). After defendant presented his defense, the jury convicted him as charged (R. 396:248). Defendant was sentenced to a suspended term of five-years-to-life, was ordered to serve 365 days in jail, and was placed on 36 months' probation (R. 261-63).

Defendant moved for a new trial, claiming prosecutorial misconduct in closing argument (R. 266-78). The State opposed the motion (R. 289-93). After a hearing, the trial court denied the motion (R. 368-70).

Defendant timely appealed (R. 371-73).

STATEMENT OF FACTS[1]

On July 21, 2002, a fire was intentionally started in room 112 of defendant's motel in Heber City, Utah (R. 394:74, 164-66, 172, 186-87). At the time, the room was locked (R. 394:112, 128). Defendant's fingerprints were the only ones found on the inside door knob, on an illegible motel receipt found on the night stand, and on a taco shell bag also found on the night stand (R. 395:131-32, 182, 185; R. 396:50, 54-56). Although there was a fire detector in the room, its battery had been disconnected (R. 395:56-57). Defendant's wife's first reaction when she saw the fire was to point to room 112 as she screamed, "My husband" (R. 394:16, 18, 36).

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[1]Except as otherwise indicated, the facts are presented in the light most favorable to the jury's verdict. *See State v. Green*, 2004 UT 76, ¶ 1 n.1, 99 P.3d 820.

Next to room 112, a stairwell led to rooms upstairs, where a fire had also been intentionally started in the hallway (R. 394:166-71, 186). All the rooms upstairs were locked (R. 395:96, 211). In one of the upstairs rooms, the fire detector lay on the floor (R. 394:153). In several other rooms, the batteries had been disconnected, even though defendant claimed the alarms were checked regularly (R. 395:90-91, 97-98, 174).

Shortly after the fires began, a passer-by, who was also an experienced fireman, noticed the fire and stopped to help (R. 394:9). His first act was to locate defendant and tell him to call 911 (R. 394:12). Instead, defendant, who was "[r]ather calm," followed the fireman to the scene of the fire (R. 394:11, 14). The fireman had to ask defendant twice before defendant actually returned to his office to make the call (R. 394:12, 14, 32).

When defendant returned to room 112, he stood by passively as emergency personnel tried to enter the locked room to confirm that no one was inside (R. 394:22, 25, 112; R. 396:141). Only after an officer threatened to break down the door did defendant object, telling the officer he would get a key (R. 394:112, 128).

Defendant had purchased the Alpine Lodge in 1997 with his father-in-law (R. 396:111-12). The idea was to provide income for defendant's father-in-law and mother-in-law, as well as their sons and their sons' families once they immigrated from Pakistan (R. 393:163; R. 396:110). In 2002, defendant's brothers-in-law still had not immigrated (R. 393:164; R. 396:110). Defendant was required to do most of the work around the motel, sometimes even taking a leave from his full-time job in Salt Lake City (R. 393:164; R. 396:119).

For at least eighteen months before the fires, the motel's profit was marginal (R. 395:238-43). During several months over that period, the income from room rentals was insufficient to cover the monthly mortgage payment (R. 395:238-43). Sometimes, defendant had to lend money to the motel in order to pay its mortgage (R. 396:115-16).

Defendant put the motel on the market in 2000 (R. 393:163). After over just a year, defendant had one potential buyer; the potential buyer, however, never made an offer (R. 393:168-69, 175). On February 2, 2002, defendant placed the motel on the market again (R. 380:4). The only offer defendant received was on August 19, 2002, after the fires (R. 380:7, 10).

In early July, 2002, just weeks before the fire, defendant complained about the increased insurance rates on his motel (R. 380:20). The next week, however, defendant increased the insurance on the motel (R. 380:23-24, 26, 30). At the same time, he also secured renters' insurance on his personal belongings in the amount of $31,600 (R. 380:24-26).

On the night of the fire, defendant claimed that he had rented room 112 to a guest (R. 394:12, 111). The receipt he provided police, however, was illegible, even though defendant claimed that the guest's handwriting seemed normal (R. 395:64, 67, 76-78; R. 396:163). After the fire, police seized and reviewed defendant's motel receipts from January 2001 through September 2002 (R. 395:68, 235). Of the 831 receipts reviewed, only three were partially illegible (R.395:68, 72). In two of the cases, defendant had secured identification from the guests and reprinted that information on the receipts (R.

395:71, 74). On the third—the receipt retrieved from room 112 on the night of the fire—no such information was reprinted (St. Exh. 33).

In his first interview with police, defendant stated that Deputy Graves was the person who retrieved the receipt from room 112, picking it up with both hands (R. 395:84-85). In the second interview and at trial, defendant testified that the reason his fingerprints were on the receipt and taco bag in room 112 was because Deputy Graves had asked defendant to retrieve the receipt for him, and defendant had to move the taco bag off the receipt in order to retrieve it (R. 395:87; R. 396:133-34, 143-44, 177).

Deputy Graves' testimony contradicted both of defendant's stories. Deputy Graves testified that he never asked defendant to retrieve the receipt (R. 394:134). Rather, when they arrived at the room, defendant told Deputy Graves where the receipt was in the room, even though it was not in plain view (R. 394:118-19). At that point, Deputy Graves instructed a gloved firefighter to retrieve the receipt (R.394:120). The firefighter corroborated the deputy's testimony (R. 394:143-45).

Finally, the fire marshal testified that he found evidence of accelerant pours both in room 112 and in the hallway to the rooms above room 112 (R. 394:164-66, 172, 186-87). Officers testified that they seized two containers of paint thinner—an accelerant—from defendant's property (R. 395:232) One of those containers was paint thinner labeled Clean Strip; the other was labeled E-Z Paint Thinner (R. 395:232).

Jennifer McNair, a crime lab expert, then testified. McNair testified that the main accelerant used in the fires was gasoline (R. 396:11-13). However, a different accelerant,

a "medium petroleum distillate," was found on carpet in the closet of room 112 (R. 396:13-14). McNair testified that paint thinners are medium petroleum distillates (R. 396:13).

McNair testified that she compared the paint thinner in the container labeled Clean Strip to the accelerant used in the closet, and that the Clean Strip thinner was not consistent with the accelerant used in the closet (R. 396:14-15). McNair then testified that the amount of paint thinner in the other container, labeled E-Z Paint Thinner, was insufficient to compare to the accelerant used in the closet (R. 396:16). As a result, the crime lab purchased a different container of E-Z Paint Thinner from a local store and used that to make the comparison with the accelerant used in the closet (R. R. 396:16). Over defendant's objections, McNair testified that "[d]ue to the lack of environmental control of the questioned sample [from the closet], no conclusion as to common origin could be made" between the accelerant used in the closet and the newly purchased E-Z Paint Thinner (R. 396:21). Thus, the two accelerants "could not be matched" (R. 396:23). However, they also "could not be excluded from each other" (R. 396:23).

On cross-examination, defendant asked: "Well, I guess, scientifically when you say you can't exclude it, that doesn't really give us a lot to go on, does it? Just simply means that there's no conclusion that can be drawn from it, effectively?" (R. 396:23). McNair responded, "That's correct" (R. 396:23).

SUMMARY OF THE ARGUMENT

Issue I. Defendant claims that the evidence was insufficient to support his conviction. Defendant, however, fails to marshal most of the evidence supporting the jury's verdict. Thus, he necessarily fails to establish that the evidence was insufficient.

Issue II. Defendant claims that the prosecutor committed prosecutorial misconduct in closing argument by improperly shifting the burden to defendant to produce evidence in his defense. This Court should reject defendant's claim because he made a conscious decision to waive it below.

Even if defendant did raise a timely objection at trial, he admitted at the hearing on his new trial motion that the only relief he sought at the time was a curative instruction, which was given. Because defendant received all the relief he sought, he cannot now claim that relief was inadequate.

In any case, the prosecutor's brief remarks properly commented on defendant's testimony and the paucity of evidence supporting that testimony. Moreover, the comments were harmless given that defense counsel responded to them during his closing argument and the trial court gave a curative instruction re-affirming the State's burden of proof at the close of argument.

Issue III. Defendant claims that the trial court erred in admitting a crime lab expert's testimony that the comparison of E-Z Paint Thinner purchased from a local store and accelerant used in the closet to room 112 was inconclusive. Defendant claims that

the expert's testimony was inadmissible under rules 403, 701, and 702 of the Utah Rules of Evidence.

The same expert, however, had already testified that there was not enough E-Z Paint Thinner remaining in the container seized from defendant's motel to conduct a comparison. Thus, even before the expert's challenged testimony, the clear inference before the jury was that the E-Z Paint Thinner seized could not be excluded as the accelerant used in the closet. The expert's additional testimony, therefore, put nothing before the jury that it did not already have. Under such circumstances, defendant cannot show that he was prejudiced by the trial court's ruling, even if it were erroneous.

ARGUMENT

I. DEFENDANT HAS NOT DEMONSTRATED INSUFFICIENT EVIDENCE TO SUPPORT THE VERDICT WHERE HE HAS NOT FULLY MARSHALED THE EVIDENCE

Defendant claims that the evidence in this case "does not support a finding, beyond a reasonable doubt, that Appellant committed the crime in question." Aplt. Br. at 26. Specifically, defendant claims that, "while much evidence was adduced suggesting that the fire was the result of arson, there was relatively little evidence indicating that Appellant committed the crime." Aplt. Br. at 25. Defendant's claim lacks merit.

A defendant's "burden on appeal against [a] jury verdict is to 'first marshal *all* record evidence that supports the challenged finding.'" *State v. Pritchett*, 2003 UT 24, ¶ 25, 69 P.3d 1278 (quoting Utah R. App. P. 24(a)(9) (emphasis added)). He must then "demonstrate how the evidence against him was 'so insufficient that reasonable minds

could not have reached the verdict.'" *Id.* at ¶ 26 (quoting *State v. Colwell*, 2000 UT 8, ¶ 42, 994 P.2d 177).

In this case, defendant was charged with aggravated arson (R. 7-8). The State therefore had to prove that, "by means of fire or explosives," defendant "intentionally and unlawfully damage[d] . . . a habitable structure." Utah Code Ann. § 76-6-103 (1999).

At trial, defendant stipulated that his motel was "a habitable structure" (R. 396:190). In his motion for new trial, defendant conceded that the evidence was sufficient to show that someone had "intentionally and unlawfully damage[d] [that] structure" "by means of fire" (R. 273). Thus, on appeal, defendant challenges only whether the evidence was sufficient to show that he was that person. *See* Aplt. Br. at 21, 25.

Defendant does not claim, however, that no evidence supports a finding that he started the fires. Rather, he admits that "there was relatively little evidence indicating that Appellant committed the crime," but claims that such evidence "does not support a finding, beyond a reasonable doubt, that Appellant committed the crime in question." Aplt. Br. at 25-26.

In making his argument, defendant misconstrues this Court's duty on appeal. "To determine whether there was sufficient evidence to convict a defendant," this Court "do[es] not examine whether [it] believe[s] that the evidence at trial established guilt beyond a reasonable doubt." *State v. Holgate*, 2000 UT 74, ¶ 18, 10 P.3d 346. "[As] long as there is *some* evidence and reasonable inferences to support the jury's verdict,

[this Court] will not disturb a jury's findings." *State v. Tucker*, 2004 UT App 217, ¶ 20, 96 P.3d 368 (citations and internal quotation marks omitted) (emphasis added). As stated, defendant concedes that there was "some" evidence that supports the jury's verdict.

In any event, defendant's argument is based on an incomplete marshaling of the evidence. For example, although defendant acknowledges that "[t]he fire alarm in room 112 was not working, nor were the fire alarms in 109, 110, or 111," Aplt. Br. at 23, he fails to acknowledge that each of those rooms were locked at the time of the fires and that, in each case, the battery had been disconnected even though defendant claimed that the fire alarms were checked regularly (R. 395:56-57, 90-91, 97-98, 174).

Similarly, although defendant acknowledges that his "fingerprints were found on the door to room 112; the receipt for the individual who stayed in room 112; and on the taco bag found on the nightstand in room 112," Aplt. Br. at 24, he fails to acknowledge that his were the only prints found on those items (R. 395:131-32, 182, 185; R. 396:50, 54-56). He also fails to acknowledge that his innocent explanation for his fingerprints—that an officer told him to retrieve the receipt and that he had to move the taco bag in order to do so—was rebutted not only by the officer but by a firefighter who was also present (R. 394:118-20, 134, 143-45; R. 396:133-34, 143-44, 177).

Third, although defendant acknowledges that he "increased the insurance coverage on the North building of The Lodge weeks before it was set on fire," Aplt. Br. at 24, he fails to marshal evidence that he increased the insurance only a week after he complained that his insurance premiums were getting too high, and that, in addition to increasing

coverage on the motel itself, he for the first time secured insurance on his personal property maintained at the motel (R. 380:20, 23-26, 30).

Fourth, although defendant acknowledges that his motel "was only marginally profitable," Aplt. Br. at 24, he fails to marshal evidence that during numerous months before the fire, the income from the motel was insufficient to pay the mortgage (R. 393:164; R. 396:115-16, 119). He also fails to cite evidence that, although the motel was originally purchased for his in-laws, he was forced to do most of the work to run it, even though he had a full-time job in Salt Lake City (R. 393:164; R. 396:115-16, 119).

Finally, defendant contends that "[t]he individual who checked into room 112 did not have any ID and the receipt was too illegible to determine a name or address." Aplt. Br. at 24. Defendant, however, fails to acknowledge that the only evidence of an individual checking into room 112 on the night of the fire was defendant's own testimony, which the jury could very well have rejected in light of substantial evidence—none of which defendant marshals—undermining his testimony. For example, defendant does not marshal evidence that of the 831 receipts he had received over the eighteen months before the fire, this particular receipt was the only illegible one on which defendant had not written some identifying information (R. 395:71, 74). Nor does he cite his own testimony that when the alleged renter filled out the receipt to room 112, defendant found nothing wrong with the guest's handwriting (R. 396:163). Nor does he cite evidence that, when he finally gave investigators access to room 112, he also told

them where the receipt was located on the night stand, even though the receipt was folded and not in plain view (R. 394:118-19).

All of this additional evidence supports the jury's verdict that defendant started the fires in this case. So too does other evidence not marshaled by defendant. For example, defendant does not marshal evidence that he just watched as emergency personnel banged on the door to room 112 trying to determine whether anyone was inside, intervening only when one of those personnel threatened to bust the door down, at which time defendant objected and said he would get a key (R. 394:22, 25, 112, 128; R. 396:141). Nor does defendant marshal evidence that he gave inconsistent stories to the police concerning whether his wife knew that a person had rented room 112, initially telling them that she did not know, and then telling them that she did (R. 395:99-102).

Because defendant has not marshaled *all* the evidence supporting the jury's verdict, he has necessarily failed to show that the evidence, as properly marshaled, was insufficient to support the jury's verdict. *See Pritchett*, 2003 UT 24, ¶¶ 25-26.

II. THIS COURT SHOULD REJECT DEFENDANT'S PROSECUTORIAL MISCONDUCT CLAIM WHERE HIS ONLY COMMENT AT THE TIME WAS, "I WILL RESERVE AN OBJECTION ON THAT," DEFENDANT NEVER PURSUED THE MATTER FURTHER ON THE RECORD, AND BY HIS OWN ADMISSION, HE RECEIVED ALL THE RELIEF HE REQUESTED AT TRIAL

Defendant claims that the trial court erred in denying his motion for new trial because the prosecutor "inappropriately and impermissibly shifted the burden of proof to the defense" during closing argument. Aplt. Br. at 30-31. This Court should reject

defendant's claim because he affirmatively waived it below. In any case, the prosecutor's brief remarks were a proper comment on defendant's testimony.

A. Proceedings below.

At trial, Sergeant Perry Rose testified for the State that he seized room receipts from defendant's motel for the period from January 2001 to September 2002 (R. 395: 235). Based on those receipts, Rose calculated the monthly rental income of the motel (R. 395:238-43). Oftentimes, that monthly income was less than the monthly mortgage payment defendant owed (R. 395:238-43).

When defendant testified later, defense counsel asked him whether Sergeant Rose's calculations were "an accurate assessment of all of the receipts for those two years" (R. 396:116). Defendant responded in the negative, claiming that when the police seized the receipts, they did so only from defendant's office and living quarters (R. 396:116-17). Defendant claimed that because his father-in-law did most of the bookkeeping, the father-in-law had some of the receipts in his apartment (R. 396:117).

In closing argument, the prosecutor commented on defendant's testimony. Those comments included the following:

> Mr. Tabesh knew that nobody was staying upstairs. The next who question, who accepted this receipt . . . and thought that that looked okay? That is just crazy. That is not okay. There is not a single letter or number that is legible on that. Even on the other examples that we had that officer's [sic] went through, every single receipt the prior year-and-a-half, all the receipts they had in the office—and, *by the way, Mr. Tabesh said they didn't get all the receipts. This is what we have here. I haven't seen any others brought it.*

(R. 396:200-01) (emphasis added).

At that point, defense counsel interrupted, stating, "Your Honor, I will reserve an objection on that" (R. 396:201). The Court responded, "You may" (R. 396:201). The State then continued its argument, noting that on the only two other illegible receipts police had recovered, defendant had written identifying information (R. 396:201). The State did not revisit defendant's testimony concerning unrecovered receipts during the rest of its initial argument or in its rebuttal (R. 396:201-15, 239-44).

In his closing argument, however, defendant responded to the prosecutor's brief remarks:

> . . . [T]he evidence that you have in this case, and the only evidence before you, is that Mr. Tabesh made significant—or was able to make enough money to pay his mortgage and keep the business in operation.
>
> Now, you have that evidence, and it's in front of you, but you have that evidence from a number of sources. The very first source you have it from is from Officer Rose, who didn't even get all of the receipts. Now, Counsel says, "Where are they?" That, again, is a problem. It's not my job. It is his job. It's their burden of proof, hence, the objection that was made in that regard. He asked Officer Rose with a search warrant to go get some receipts and even with only partial receipts he shows that Mr. Tabesh has made the monthly payments on the mortgage. That wasn't all.
>
> I asked Officer Rose, I said, "Did you ask Mr. Tabesh for any additional receipts?"
>
> He said, "No."

(R. 396:224-25).

At the end of defense counsel's argument, a bench conference was held (R. 396:239). Defense counsel, however, placed nothing concerning his reserved objection on the record (R. 396:239).

At the end of the State's rebuttal argument, another bench conference was held (R. 396:244). Again, defendant failed to place any objection to the prosecutor's prior remarks on the record (R. 396:244).

After the second bench conference, the trial court gave the jury an instruction reminding them that the State alone carried the burden of proof: "The Court has instructed you on numerous other occasions, the Court will make one final instruction, that at no time does the burden ever shift to the defendant to produce any evidence with respect to a criminal case" (R. 396:244).

Following his conviction, defendant moved for a new trial, claiming that the prosecutor's remarks concerning the lack of receipts improperly shifted the burden of proof to defendant (R. 266-78). The State opposed defendant's motion, arguing that defendant waived any objection at trial in favor of a curative instruction (R. 292). In any case, the State argued, the prosecutor's statements were proper comment on the paucity of evidence produced by defendant to support his testimony (R. 291).

A hearing on defendant's motion was held on June 4, 2004 (R. 383). At that hearing, defense counsel acknowledged that he "did not make a motion for a mistrial" based on the prosecutor's comments, but, rather, "objected and asked for a curative

instruction" (R. 383:7).[2] The State reiterated its claim that defendant waived any objection to the prosecutor's closing argument.

Concerning whether defendant had waived his objection at trial, the court recalled that defendant had reserved an objection and that "we had some conferences, sidebar (R. 383:9). However, "[w]hat was said then I don't have a definite recollection other than Mr. Yengich indicated that he requested a curative instruction and the Court gave that curative instruction" (R. 383:9-10). The court therefore reserved any ruling on whether defendant had waived his claim, concluding that, in any case, "the Court does believe that even if [the argument] was improper argument that it was not the type of—or was not in the area where it would have had an impact that would have been—would have brought a different result" (R. 383:10).

Defense counsel, recognizing that the waiver issue could affect defendant's appeal, urged the trial court "to deal with the waiver issue," asserting that "[t]here was a conference at the bench reserving any motion as far as a mistrial is concerned but what was clearly stated was that the objection related to comment on the failure of the defendant to present evidence that that's exactly why you instructed the jury in the way I requested you to and so I think . . . it cannot be claimed that a specific objection was not made" (R. 383:11). The State countered:

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[2]In his affidavit attached to defendant's new trial motion, defense counsel stated he "personally objected in a timely manner on the basis that the [prosecutor's] argument constituted prosecutorial misconduct and that a new trial was, therefore, warranted" (R. 268). Counsel's admission at the new trial hearing, of course, negates that statement.

> That's completely wrong, Your Honor. If defendant had made an objection that I had committed misconduct, I would have responded to that. Instead, when we had that sidebar, Mr. Yengich said, you know, instead of going through that objection thing, I'll just request a curative instruction and I had no problem with the Court repeating an instruction it had already given. I have no problem with that even now but for a finding that I committed misconduct I would have objected and, so yes, I was never given the opportunity and the Court never ruled on that issue and that's the relevant issue. There's nothing to appeal from because there's no ruling on the record on that issue because no objection was made.

(R. 383:11-12). When defense counsel responded that the court's giving a curative instruction "is a ruling effectively," the State countered, "Not when there's a stipulation to it" (R. 383:12). The trial court concluded:

> Well, there was clearly no chance for [the prosecutor] to respond on the record to the objection. Clearly the Court did, based upon stipulation of the parties [give] a curative instruction. Without a transcript I'm not going to make a ruling with respect to whether there was a waiver.

(R. 383:12). "I just haven't made a decision one way or the other" (R. 383:13). When defense counsel noted, "but that holds us up in appeal times and issues," the court stated, "[i]f the Court of Appeals remands it then we'll make a decision" (R. 383:13).

B. This Court should reject defendant's claim because he waived it below.

The general rule in criminal cases is that "'a contemporaneous objection or some form of *specific* preservation of claims of error must be made a part of the trial court record before an appellate court will review such claim on appeal.'" *State v. Johnson,* 774 P.2d 1141, 1144 (Utah 1989) (citation omitted); *see also State v. Holgate*, 2000 UT

74, ¶ 11, 10 P.3d 346. The objection at trial must "be specific enough to give the trial court notice of the very error . . . complained of," *Beehive Medical Elecs., Inc. v. Square D. Co.*, 669 P.2d 859, 860 (Utah 1983), so that the court "might have an opportunity to correct [it] if [the court] deems it proper," *Redevelopment Agency of Salt Lake City v. Barrutia*, 526 P.2d 47, 51 (Utah 1974). This preservation rule "applies to every claim . . . unless a defendant can demonstrate that 'exceptional circumstances' exist or 'plain error' occurred." *Holgate*, 2000 UT 74, ¶ 11 (citations omitted).

Moreover, "it [is] the responsibility of the parties, not the trial court, to ensure that any objections were preserved in the record." *State v. Calliham*, 2002 UT 86, ¶ 33 n.11, 55 P.3d 573; *see also State v. Worthen*, 765 P.2d 839, 845 (Utah 1988) (rejecting claim in part because the record did not establish it had been preserved). "If . . . the ruling was made in an off-the-record bench conference, the defendant [has the duty to] request[] that a record be made of the ruling or, in the alternative, prepare[] a statement of the proceedings according to Rule 11(g), [Utah Rules of Appellate Procedure]." *Worthen*, 765 P.2d at 845. Otherwise, this Court "ha[s] no record [of the] objection being made below and must conclude, therefore, that the trial court's attention was never called to it." *State v. Tucker*, 709 P.2d 313, 315 (Utah 1985), *abrogated on other grounds by State v. Long*, 721 P.2d 483 (Utah 1986).

Finally, "'if a party through counsel has made a conscious decision to refrain from objecting or has led the trial court into error, [this Court] will then decline to save that party from the error.'" *Calliham*, 2002 UT 86, ¶ 70 (quoting *State v. Bullock*, 791 P.2d

155, 158 (Utah 1989)). "'Defendants are thus not entitled to both the benefit of not objecting at trial and the benefit of objecting on appeal.'" *Id.* (quoting *Bullock*, 791 P.2d at 159). Nor will this Court consider an issue raised for the first time in a post-trial motion if the trial court concludes that the claim was waived at trial. *See State v. Johnson*, 821 P.2d 1150, 1161 (Utah 1991).

In this case, defendant's immediate response to the prosecutor's comment was not to raise an objection but only to reserve one (R. 396:201). Although two off-the-record bench conferences followed before the conclusion of closing arguments, defendant never addressed his reserved objection on the record (R. 396:239, 244). Thus, the record contains no indication of whether defendant even raised an objection during the bench conferences, let alone the basis of such an objection. Because defendant made "no record [of the] objection being made below," this Court "must conclude . . . that the trial court's attention was never called to it," and that it was therefore waived. *Tucker*, 709 P.2d at 315; *see also Calliham*, 2002 UT 86, ¶ 33 n.11; *Worthen*, 765 P.2d at 845.

Moreover, although a defendant may successfully revive a claim in a post-trial motion if the trial court reaches its merits, *see Johnson*, 821 P.2d at 1161, this Court should conclude, under the unique facts of this case, that the trial court did not revive defendant's claim here.

In this case, the trial court admittedly did not find that defendant's claim had been waived. At the same time, however, the court also did not find that defendant's claim had not been waived. To the contrary, the court specifically refused defendant's request to

make such a finding without first reviewing the trial transcripts (R. 383:12). Defendant never asked the trial court to revisit the issue once the trial transcripts were completed. Thus, defendant never took the action necessary for the trial court to rule that his claim had in fact not been waived. Defendant's failure to do so should preclude review of his claim on appeal. *See, e.g., Calliham*, 2002 UT 86, ¶ 33 n.11 (holding that "it [is] the responsibility of the parties, not the trial court, to ensure that any objections were preserved in the record").

More importantly, defense counsel's concessions at the hearing on his new trial motion make clear that he did in fact affirmatively waive any prosecutorial misconduct claim at trial. At the new trial hearing, counsel acknowledged that he "did not make a motion for a mistrial" based on the prosecutor's remarks, but, rather, only "asked for a curative instruction" (R. 383:7). Counsel also explained why he did not move for a mistrial: "I think practically and I think candidly, Your Honor, that this is not a case that at that point . . . , that this Court was lightly to say, no, I'm going to grant a mistrial and I'm not going to submit it to the jury (R. 383:7).

The clear import of defense counsel's concessions is that, even assuming he did object to the prosecutor's closing remarks during one of the bench conferences, counsel made a conscious decision at that time to forego asking for a mistrial in favor of a curative instruction, which was given. Because defendant received the only relief he sought at trial, he cannot now complain that such relief was inadequate. *See Calliham*, 2002 UT 86, ¶ 70 ("Defendants are . . . not entitled to both the benefit of not objecting at

trial and the benefit of objecting on appeal.") (quoting *Bullock*, 791 P.2d at 159); *see also State v. Smith*, 776 P.2d 929, 932 (Utah App. 1989) (holding that where "defendant had two opportunities to move for a mistrial" and "[h]e deliberately and affirmatively refused on both occasions, . . . defendant waived his right to now complain"); *cf. State v. Winward*, 941 P.2d 627, 633, 635 (Utah App. 1997) (rejecting plain error challenge to prosecutor's closing remarks where defendant strategically chose not to "request a curative instruction or move for a mistrial"). Stated otherwise, defendant cannot claim after trial that the prosecutor's remarks warranted a new trial when he consciously chose not to request that relief at trial.

C. Even on the merits, defendant's claim fails because the prosecutor's remarks were proper comment on the evidence in light of defendant's testimony.

Even if this Court were to reach the merits of this claim, it fails because the prosecutor's remarks were proper comment on defendant's testimony and the paucity of evidence defendant produced to support that testimony.

To establish prosecutorial misconduct, defendant must show that "'the prosecutor's comments call[ed] the jurors' attention to matters not proper for their consideration and [that] the comments have a reasonable likelihood of prejudicing the jury by significantly influencing its verdict.'" *State v. Jimenez*, 2001 UT App 68, ¶ 15, 21 P.3d 1142 (quoting *State v. Reed*, 2000 UT 68, ¶ 18, 8 P.3d 1025) (additional citation and internal quotation marks omitted), *cert. denied*, 29 P.3d 1 (Utah 2001). "'In determining whether a given statement constitutes prosecutorial misconduct, the statement must be

viewed in light of the totality of the evidence presented at trial.'" *State v. Wright*, 893 P.2d 1113, 1118 (Utah App. 1995) (quoting *State v. Cummins*, 839 P.2d 848, 852 (Utah App. 1992)).

"'Because a trial court is in the best position to determine an alleged error's impact on the proceedings, [this Court] will not reverse a trial court's denial of a mistrial [or new trial] motion based on prosecutorial misconduct absent an abuse of discretion.'" *State v. Pritchett*, 2003 UT 24, ¶ 10, 69 P.3d 1278 (quoting *State v. Harmon,* 956 P.2d 262, 276 (Utah 1998). "'This standard is met only if the error is substantial and prejudicial such that there is a reasonable likelihood that in its absence, there would have been a more favorable result for the defendant.'" *Id.* (quoting *Harmon,* 956 P.2d at 276) (additional citations and quotation marks omitted).

Finally, trial counsel have "'considerable latitude in closing argument to the jury and may fully recount the evidence adduced and the reasonable inferences to be drawn therefrom.'" *State v. Baker*, 963 P.2d 801, 804 (Utah App. 1998) (quoting *State v. Hopkins*, 782 P.2d 475, 478 (Utah 1989)). Moreover, "'the prosecutor has the duty to argue the case based on the total picture of the evidence or lack of evidence, including the paucity or absence of evidence adduced by the defense.'" *State v. Tilt*, 2004 UT App 395, ¶ 18, 101 P.3d 838 (quoting *State v. Bailey*, 712 P.2d 281, 286 (Utah 1985)); *see also State v. Nelson-Waggoner*, 2004 UT 29, ¶ 31, 94 P.3d 186 ("It is clear that a prosecutor's comments about the 'paucity or absence' of a defendant's evidence does not offend constitutional guarantees against self-incrimination."). And, "when a defendant has

testified during a trial, it is proper during a closing argument to comment on defendant's credibility." *Jimenez*, 2001 UT App 68, ¶ 16; *see also Baker*, 963 P.2d at 804 ("[C]ourts generally recognize that, during closing arguments, a prosecutor may comment on the credibility of witnesses."); *State v. Cummins*, 839 P.2d 848, 853 (Utah App. 1992) (upholding trial court's ruling that prosecutor's "suggestion that defendant had manufactured his testimony . . . [was a] 'logical[] extension[] of . . . the facts of th[e] case,' and 'reasonable inference[s]'") (citations omitted; ellipses in original).

In this case, the State presented evidence of the monthly income received by defendant's motel based on room receipts it had seized from the motel office after the arson (R. 395:235, 238-43). In his defense, defendant testified that the State's calculation of his motel's monthly income was inaccurate because it did not include receipts that defendant's father-in-law kept in his apartment (R. 396:116-17). Defendant, however, did not produce those additional receipts at trial, nor did he explain why those receipts were not produced (R. 396:116-17).

In closing argument, the prosecutor reviewed its evidence concerning the motel's monthly income (R. 396:200-01). In the course of that review, the prosecutor noted, "[B]y the way, Mr. Tabesh said they didn't get all the receipts. This is what we have here. I haven't seen any others brought it" (R. 396:200-01).

Contrary to defendant's claim, the prosecutor's comments did not imply that defendant had any burden of proof. Rather, where defendant testified at trial, the prosecutor's comments were proper "comment on defendant's credibility," *Jimenez*, 2001

UT App 68, ¶ 16, and "the paucity or absence of evidence adduced by the defense" corroborating defendant's testimony, *Tilt*, 2004 UT App 395, ¶ 18 (citation and internal quotation marks omitted); *Nelson-Waggoner*, 2004 UT 29, ¶ 31. Thus, the prosecutor's comments clearly fell within the "considerable latitude" given counsel in closing argument to address "the evidence adduced and the reasonable inferences to be drawn therefrom." *Baker*, 963 P.2d at 804 (citation and internal quotation marks omitted). The prosecutor's comments, therefore, did not "call the jurors' attention to matters not proper for their consideration." *Jimenez*, 2001 UT App 68, ¶ 15 (citations and internal quotation marks omitted).

Even if the prosecutor's remarks were improper, defendant cannot show "a reasonable likelihood [that they] prejudic[ed] the jury by significantly influencing its verdict." *Id.* (citations and internal quotation marks omitted). First, the prosecutor's brief comments occurred in the middle of its initial closing argument, after which the prosecutor did not address the issue again. *Cf. State v. Byrd*, 937 P.2d 532, 536 (Utah App. 1997) (holding frequency of comment is relevant in determining prejudice).

Second, because defendant's testimony concerning the State's miscalculation of the motel's income was central to his defense, the likelihood that defense counsel would have addressed defendant's testimony in his closing argument, even if the prosecutor had not done so first, is very high. At that point, the prosecutor certainly could have responded to defense counsel's statements in rebuttal with the same remarks the prosecutor made during his argument. *Cf. Tilt*, 2004 UT App 395, ¶ 18 (holding that

where defendant opens door "by arguing at length in his closing argument to the jury that it should acquit him based upon [defense] theory," prosecutor "was entitled to rebut [these] remarks" by commenting on the lack of evidence supporting defendant's theory) (citations and internal quotation marks omitted) (second alteration in original).

Third, defense counsel responded to the prosecutor's remarks in his closing argument and reminded the jury that defendant had no burden to produce any evidence in a criminal trial, stating, "It's not my job. It is [the prosecutor's] job. It's their burden of proof" (R. 396:225).

Finally, the trial court instructed the jury three times concerning the burden of proof in a criminal case. It did so first before the trial began (R. 207-10; R. 383:9; R. 393:131, 140). It did so again just before closing argument (R. 207-10; R. 383:9; R. 396:190). And, at defendant's request, it did so a third time after closing argument, when the court re-iterated "that at no time does the burden ever shift to the defendant to produce any evidence with respect to a criminal case" (R. 383:9; R. 396:244). Defendant has not shown that the prosecutor's brief comments were so prejudicial as to defeat the mitigating effect of those instructions. *See State v. Kohl*, 2000 UT 35, ¶24, 999 P.2d 7 (holding that defendant must show comment was so prejudicial "as to defeat the mitigating effect of the court's . . . curative instructions")

Given these facts, defendant cannot show that he was prejudiced by the prosecutor's brief remarks, even if they were improper.

III. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN ADMITTING SCIENTIFIC EVIDENCE WHERE THE SAME INFERENCE WOULD HAVE EXISTED EVEN IF THE CHALLENGED EVIDENCE HAD NOT BEEN ADMITTED

Defendant claims that the trial court "improperly permitted expert testimony regarding inconclusive testing of accelerants found at the lodge." Aplt. Br. at 34 (capitalization omitted). Specifically, defendant claims that the trial court improperly allowed expert testimony concerning "a comparison . . . made between a store-bought can of paint thinner and the accelerant used in the fire" because "the results of this comparison were inconclusive" and "insufficient evidence was presented establishing that the store-bought paint thinner had the same chemical composition as the thinner found at the Lodge." Aplt. Bt. at 36. This Court should reject defendant's claim because he cannot show that he was prejudiced by the trial court's ruling, even if it were erroneous.

A. Proceedings below.

At trial, the fire marshal testified that he found evidence of accelerant pours both in room 112 and in the hallway to the rooms above room 112 (R. 394:164-66, 172, 186-87). Officers testified that they seized two containers of paint thinner—an accelerant—from defendant's property (R. 395:232) One of those containers was paint thinner labeled Clean Strip; the other was labeled E-Z Paint Thinner (R. 395:232).

Jennifer McNair, a crime lab expert, then testified. McNair testified that the main accelerant used in the fires was gasoline (R. 396:11-13). However, a different accelerant, a "medium petroleum distillate," was found on carpet in the closet of room 112 (R.

396:13-14). McNair testified that paint thinners are medium petroleum distillates (R. 396:13).

McNair testified that she compared the paint thinner in the container labeled Clean Strip to the accelerant used in the closet, and that the Clean Strip thinner was not consistent with the accelerant used in the closet (R. 396:14-15). McNair then testified that the amount of paint thinner in the other container, labeled E-Z Paint Thinner, was insufficient to compare to the accelerant used in the closet (R. 396:16). As a result, the crime lab purchased a different container of E-Z Paint Thinner from a local store and used that to make the comparison with the accelerant used in the closet (R. R. 396:16).

When the prosecutor asked McNair what the results of that comparison were, defendant objected on the basis of foundation and relevance (R. 396:16). Specifically, defendant argued that, "without further foundation as to manufacturing date and other things, it leaves the jury simply to speculate as to that" (R. 396:17). Thus, defendant asserted, the evidence was inadmissible under rules 403, 701 and 702 of the Utah Rules of Evidence (R. 396:17, 20).

The prosecutor then proffered the expert's testimony: "[S]he is not going to testify that it was a definitive match. What she is going to say is that they are sufficiently similar that she can't exclude it. It could have been the same, or it may not have been the same, but that's the most she can do with it" (R. 396:18).

The trial court ruled: "The Court is going to permit her to testify as to what the results of the test were. And, clearly, as Mr. Yengich has pointed out, at least in my mind, it's not very convincing evidence" (R. 396:20).

The expert then responded to the prosecutor's question concerning the results of the comparison between the store-bought paint thinner and the accelerant found in the closet. She testified that "[d]ue to the lack of environmental control of the questioned sample [from the closet], no conclusion as to common origin could be made" (R. 396:21). Thus, the two accelerants "could not be matched" (R. 396:23). However, they also "could not be excluded from each other" (R. 396:23).

On cross-examination, defense counsel asked: "Well, I guess, scientifically when you say you can't exclude it, that doesn't really give us a lot to go on, does it? Just simply means that there's no conclusion that can be drawn from it, effectively?" (R. 396:23). McNair responded, "That's correct" (R. 396:23).

B. Defendant's claim fails because he has not shown prejudice.

"Although the admission or exclusion of evidence is a question of law, [this Court] review[s] a trial court's decision to admit or exclude specific evidence for an abuse of discretion." *State v. Cruz-Meza*, 2003 UT 32, ¶ 8, 76 P.3d 1165. "[E]ven where error is found, reversal is appropriate only in those cases where, after review of all the evidence presented at trial, it appears that absent the error, there is a reasonable likelihood that a different result would have been reached." *State v. Norton*, 2003 UT App 88, ¶ 11, 67 P.3d 1050 (citations and internal quotation marks omitted; alteration in original).

In this case, this Court need not decide whether the trial court's ruling was erroneous because defendant cannot show that "absent the error, there is a reasonable likelihood that a different result would have been reached." *Id.*

Jennifer McNair first testified that the Clean Strip paint thinner found on defendant's property was not the accelerant used in the closet (R. 396:14-15). She then testified that there was an insufficient amount of E-Z Paint Thinner in the container found on defendant's property to make any comparison (R. R. 396:16).

Over defendant's objection, McNair then testified that the comparison between the store-bought E-Z Paint Thinner and the accelerant used in the closet was inconclusive (R. 396:21). Thus, the two accelerants could neither "be matched" nor "excluded from each other." (R. 396:23). Rather, as defense counsel confirmed on cross-examination, "there's no conclusion that can be drawn from" the comparison (R. 396:23).

No prejudice resulted from this testimony, even if it were erroneously admitted. The jury had already been told that there was insufficient E-Z Paint Thinner recovered from the motel to compare it to the accelerant used in the closet. Thus, the clear inference before the jury—even before the expert's challenged testimony—was that no evidence excluded the E-Z Paint Thinner found at the scene from the accelerant used in the closet.

Because this is the same evidence that was before the jury after the challenged testimony was admitted, defendant cannot show that, absent the challenged testimony, "there is a reasonable likelihood that a different result would have been reached." *Norton*, 2003 UT App 88, ¶ 11 (citations and internal quotation marks omitted).

CONCLUSION

Based on the foregoing, the State asks this Court to affirm defendant's conviction.

RESPECTFULLY SUBMITTED 1 April ~~March~~ 2005.

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CERTIFICATE OF MAILING

I certify that on 1 ~~March~~ April 2005, I caused to be ___ delivered/ ✓ mailed, by U.S. Mail, postage prepaid, two accurate copies of this ***BRIEF OF APPELLEE*** to Ronald J. Yengich, Yengich, Rich & Xaiz, 175 East 400 South, Suite 400, Salt Lake City, Utah 84111, Attorney for Appellant.

Karen A. Klucznik

Addendum A

76-6-103. Aggravated arson.

(1) A person is guilty of aggravated arson if by means of fire or explosives he intentionally and unlawfully damages:

(a) a habitable structure; or

(b) any structure or vehicle when any person not a participant in the offense is in the structure or vehicle.

(2) Aggravated arson is a felony of the first degree.